

(1967) 09 CAL CK 0014
In the Calcutta High Court
Case No : Suit No. 162 of 1967

In Re: Arbn. Indian Mutual General Society

Date of Decision : 15-09-1967

Acts Referred:

Arbitration Act, 1940 — Section 34
Civil Procedure Code, 1908 (CPC) — Section 9

Citation : AIR 1968 Cal 340 : (1968) 1 ILR (Cal) 212

Hon'ble Judges : S. Datta, J

Bench : Single Bench

Advocate : Pronab K. Pal, for the Appellant; Dipankar Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

S. Datta, J.—This is an application for stay of a suit u/s 34 of the Arbitration Act made by Indian Mutual General Insurance Society Ltd. against Hardev Singh Motiram and Auto Finance Corporation who have filed a suit being Suit No. 808 of 1967 against the Insurance Company for a sum of Rs. 13,184/70p. due to them under the Policy in respect of loss or damage caused to the vehicle insured.

2. The said policy contains as usual an Arbitration Clause relevant of which is as follows :

Clause (8)

"All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator, to the decision of two Arbitrators, one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an Award shall be a condition precedent to any right of action against the Society. If the Society shall disclaim liability to the Insured for any claim hereunder and such claims shall not within

twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained that the claim shall for all purposes be deemed to have abandoned and shall not thereafter be recoverable hereunder."

3. There is also a writing in rubber stamp below Clause (9) at the bottom of the page which is as follows:

"In case of any claim arising in respect of the property hereby insured the same shall be settled and paid in Madras and it is hereby agreed that no suit or action against the Society for the purpose of enforcing any claim on this Policy shall be instituted by the Assured in any Court other than a Court situated in the City of Madras.

4. There is also written in rubber stamp in the Schedule of the said policy as follows:

"Arbitration proceeding contemplated in the Policy shall take place only in the City of Madras".

5. On or about the 10th December, 1965 there was an accident to the truck insured under the said policy near Ranigunge. There was considerable damage to the car. This required according to the respondent a sum of Rs. 13,184/70p. for repair. Therefore, according to the petitioner the dispute arises out of this policy. The respondent resisted the application for stay on several grounds. The accident took place in Asansole.

6. It was firstly contended that those endorsements in rubber stamp do not form part of the said policy and therefore, the respondent is not bound to go to Madras for a suit or arbitration proceeding. The question whether they are parts of the agreement is not only a question which affects the jurisdiction of the arbitrator but are also such as to affect the jurisdiction of this Court. Therefore, in my opinion, this Court ought and not the arbitrator to adjudicate those questions. In my opinion this controversy cannot be decided without a trial on evidence.

7. It was next urged that in any event the balance of inconvenience in favour of adjudication in Calcutta rather than in Madras, the proposal was made in Calcutta. The covered note was issued from Calcutta. The policy was delivered from Calcutta. The policy was delivered from Calcutta through its Calcutta office. The accident took place much nearer than Calcutta from Madras. The vehicle was brought down after the accident and was repaired in Calcutta. The necessary documents and witnesses are of in and around Calcutta. The survey was made in Calcutta. The only thing as against this that the policy was actually made in Madras and the agreement contains a stipulation that it should be adjudicated in Madras. In view of authorities such a stipulation is not necessarily decisive. In this connection reference may be made to Michael Golodetz and Others Vs. Serajuddin and Company, . In my opinion on the facts of this case, the balance

of convenience dictates that matter should be adjudicated in Calcutta rather than in Madras situate 1000 miles further away from the place of accident than Calcutta when practically everything took place here. It would be oppressive not only on the petitioner but on the respondent to force the parties to adjudicate the same in Madras. Hence, on this point alone it should not be stayed.

8. It was thirdly urged that there is a charge that the vehicle was involved in theft clearly in the petition. This would be apparent from the allegations made in paragraph 4 of the petition. It was urged strenuously that it is no charge against the owner of the vehicle as will appear from their letter dated the 15th July 1966. It is really a point in the first instance that the driver was not a driver within the meaning of the policy, for evidently he did remove the stolen goods without the knowledge and consent of his master. In my opinion, this may be a point of view which may be canvassed. But it is also clear that the opposite view also may be canvassed with greater force that the owner himself was involved in the removal of the stolen goods. Therefore this is a charge of criminal act which the respondent can demand to be tried in open Court. Hence, on this ground again the suit should not be stayed.

9. It was next urged that in fact there was a reference that each of the parties appointed an arbitrator. The arbitrator however did not move in the matter. The petitioner who is now anxious to have arbitration did not take any steps to proceed with the arbitration and thereby has failed to satisfy that he was ready and willing to do his part to have the matters adjudicated. It was urged that it was not known to the petitioner that the arbitrator could not move in the matter because they disagreed to the venue of the arbitration. Their arbitrator insisted upon Madras and the arbitrator nominated by the respondent insisted Calcutta being the venue and in view of this non-co-operation between the arbitrators there was no sitting and consequently there was no appointment of any umpire in terms of the arbitration clause. Hence this cannot be taken into account in considering that they were ready and willing to carry on arbitration proceedings at the time of commencement of the suit. The petitioner appointed the arbitrators as far back as the 11th day of October 1966 and the respondent appointed the arbitrator as far back as the 3rd day of October 1966. The Arbitrators did not move. This should have given sufficient notice to the petitioner to enquire from the arbitrator as to what had happened assuming they had not done so. When four months expired they should have been all the more alert and enquired what had happened to the arbitration proceedings. They did not do anything. Then they allowed months to pass. They did nothing. Hence, in these circumstances, it cannot be said that the petitioner was ready and willing to go on with the arbitration proceedings at the time of commencement of the suit.

10. The arbitrators have become functus officio. There is no application for extension of time to file the award or appointment of another arbitrator in case it can be done under the arbitration clause or revocation of authority of the

arbitrator or that the arbitration agreement has ceased to have effect. The arbitrators cannot continue.

11. In my view, on these several grounds the application should be dismissed with costs.